U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 January 2004

CASE NO.: 2002-LHC-00759

OWCP NO.: 01-144187

In the Matter of

ROBERT LEWIS ZINGG
Claimant

v.

P & W MARINE SERVICE, INC.
Employer

and

AMERICAN HOME ASSURANCE CO.
Carrier

Appearances:

G. Brian Shontz, Norwell, Massachusetts,
for the Claimant

Scott L. Richardson, with whom Thomas P. O'Reilly
appeared on brief, (Curtin, Murphy & O'Reilly),
Boston, Massachusetts, for the Employer and Carrier

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

This proceeding arises from a claim for worker's compensation benefits filed by Robert Zingg (the "Claimant") against P&W Marine Services, Inc. ("P&W") under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the Act). In a prior related proceeding before Administrative Law Judge Rudolph L. Jansen, the Claimant was found entitled to temporary total disability benefits and medical care for injuries to

his right upper extremity sustained on November 17, 1997 while he was working for P&W. *Zingg v. P&W Marine*, Case No. 1999-LHC-01221 (January 10, 2000). In the current proceeding, the Claimant seeks an award of permanent total disability compensation as well as continuing medical care. This claim was referred to the Office of Administrative Law Judges ("OALJ") for hearing after an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP") failed to produce a mutually satisfactory resolution.

Pursuant to notice, a formal hearing which was conducted before me in Boston, Massachusetts on May 15 and 17 and June 17, 2002, at which time all parties were given the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of P&W and its insurance carrier, American Home Insurance Company ("AHIC"). The Claimant and two vocational experts, one called by the Claimant and the other called by P&W, testified at the hearing, and documentary evidence was admitted at the hearing without objection as Joint Exhibit ("JTX") 1, Claimant's Exhibits ("CX") 1-7 and Respondents' Exhibits ("RX") 1-7. Hearing Transcript ("TR") 8-11, 156, 170. At the close of the hearing, the record was held open at the Respondents' unopposed request to offer the deposition testimony of a Dr. Wyman to be taken post-hearing, and the parties were granted leave to file written closing argument. By letter dated September 9, 2002, the Respondents offered the transcript of the deposition taken of Edwin T. Wyman, M.D. on August 23, 2002 which I have admitted as RX 8, noting that the Claimant has raised no objection. Written closing argument was timely received from both counsel. Counsel to the Claimant also filed an application for an award of attorney's fees. The record is now closed.

Upon review of the evidence of record and the parties' arguments, I conclude that the Claimant is entitled to an award of permanent partial disability compensation based on the permanent loss of use of his right arm. My findings of fact and conclusions of law are set forth below.

II. Findings of Fact and Conclusions of Law

A. Background

In the prior proceeding, Judge Jansen made the following findings which have not been challenged by the parties:

> Claimant, Robert Lewis Zingg, is a sixty-two year old longshoreman who was employed by P & W Marine (hereinafter, Employer) at the time of the accident. (Tr. 13). He quit school after completing the eighth grade and then performed non-union longshore odd jobs until he joined the U.S. Army in 1954. (Tr. 14). He served until 1958 and then worked pumping gasoline, performing non-union longshore work, working construction, and moving furniture. (Tr. 15). He became a full time longshoreman in 1966. (Tr. 15). He does not have a driver's license and relies on public transportation or his wife for transportation. (Tr. 53).

Claimant's longshore job involved working as a holder from 1966 to 1997. (Tr. 15-16). Although the nature of this work has evolved over the years, the job currently consists of lashing and unlashing cargo to the decks of ships. (Tr. 16-17). This job requires frequent lifting and carrying of chains, turnbuckles, and lashing bars. These objects can weigh up to one hundred pounds and at times, must be carried distances up to nine hundred feet. (Tr. 18-19).

On November 17, 1997, Claimant was in the process of unlashing a container when a one hundred pound lashing bar came loose and started to fall. (Tr. 20-21). Claimant caught the bar and then slipped and struck his right arm and elbow against a container. (Tr. 19-20). He worked the rest of the day, but his arm felt progressively worse. (Tr. 21). By the end of the day, he could not pick up a thirty-five pound pin with his injured arm. (Tr. 22).

The next day, Claimant went to Beth Israel Hospital and was referred to the Orthopedic Center. (Tr. 22-23). He was eventually given a brace to wear and treated with pain medication, therapy, and cortisone shots, but he did not find these treatments helpful. (Tr. 22-26). At the time of the hearing, Claimant testified that his arm was in so much pain that he could hardly use it at all. (Tr. 28). The pain is so severe that he cannot make a fist. Since the pain is worse when he attempts to use his arm, he rarely uses it despite the fact that he is right-handed. (Tr. 29-31 and 36). Claimant's arm bothers him if he attempts to write for any length of time. (Tr. 39). He testified that he is willing to have surgery if a physician recommends this course of action. (Tr. 28).

Prior to the accident, Claimant suffered a ruptured disc and a crushed left finger. (Tr. 32). He has difficulty picking up small, fine items with his left hand due to the latter injury. (Tr. 32). Although Claimant's pain is severe enough to interfere with his sleep, he does not like to take pain pills since he suffers from ulcers and the medication bothers his stomach. (Tr. 37). Claimant testified that he wants to return to work but cannot. (Tr. 38). He attempted to return to work, but Employer could not accommodate his restrictions. (Tr. 41).

CX 6 at 2-3. Subsequent to Judge Jansen's decision, the Claimant had reconstructive surgery performed in September 2000 on the medial collateral ligament of the right elbow by Jeffrey L. Zilberfarb, MD. CX 2 at 1. Eleven months after the surgery, Dr. Zilberfarb reported in an August 13, 2001 letter to the Claimant's attorney that it was his assessment that the Claimant had received "significant benefit" from the reconstructive surgery "although he is certainly still totally disabled from his prior occupation as a longshoreman which involves a lot of heavy lifting." CX 2 at 2. Dr. Zilberfarb further stated that he considered the Claimant's disability to be total and permanent, but he also wrote that the Claimant "is capable of light duty work only that involves lifting no more than 2 lb with the right arm nor any repetitive motions of the elbow, wrist and hand, on a permanent restriction basis." *Id.*

The Claimant has not returned to any gainful employment since the November 17, 1997 work-related injury. He testified that the constant pain he experienced prior to the surgery remains about the same, and he stated that this pain increases when he tries to move his arm. TR 26-28. Contrary to Dr. Zilberfarb's assessment, he testified that he did not feel that he benefited from the reconstructive elbow surgery. TR 27. According to the Claimant, he has recovered almost no use of his right hand and arm since the surgery. He maintained that because of the constant, severe pain he is unable to use his right hand to wash, shave, dress, cut food, or sign a credit card receipt as writing causes his pain to increase to level ten on a scale of one to ten. TR 29-35. He said that he has even cut back on the amount of time that he spends playing cards with friends. TR 38-40.

B. Stipulations and Issues Presented

At the May 15, 2002 hearing, the parties stipulated that: (1) the Act applies; (2) the Claimant sustained an injury on November 17, 1997 which arose out of and in the scope of his employment; (3) P&W learned of the injury on November 17, 1997; (4) an employee-employer relationship existed at the time of the injury; (5) the average weekly wage at the time of the injury was $1,163.47 which produces a 2/3 compensation rate of $775.63; (6) the current claim was filed in May 22, 2001; (7) P&W was given notice of the claim on May 22, 2001; (8) a timely notice of controversion was filed; (9) temporary total disability compensation has been paid to the Claimant at the rate of $775.63 per week since November 18, 1997, totaling approximately $181,500.00 at the time of the hearing on May 15, 2002; (10) the Claimant reached a point of maximum medical improvement from the November 17, 1997 injury on April 17, 2001 and has a degree of permanent disability; and (11) an informal conference on the current claim was held on December 4, 2001. JTX 1; TR 7-9.

The parties are in agreement that the sole issue presented for adjudication is the extent of the Claimant's permanent disability arising from the November 17, 1997 work-related injury. The Claimant contends that he is totally disabled from any employment and should therefore be awarded permanent total disability compensation. He also argues that P&W is barred by the doctrine of collateral estoppel from attempting to relitigate Judge Jansen's finding that he is totally disabled. P&W concedes that permanent disability has resulted from the injury, but it argues that the Claimant is not incapacitated from all employment as it has introduced vocational evidence that there are a substantial number of jobs which he could perform notwithstanding his physical limitations. Thus, P&W contends that the Claimant is limited to an award of permanent partial disability compensation based on the loss of use of his right arm under the Supreme Court's holding in *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980) (*PEPCO*).

C. Nature and Extent of the Claimant's Disability

The Act defines disability as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Thus, disability under the Act has been described as "an economic concept based upon a medical foundation." *Bath Iron Works Corp. v. White*, 584 F.2d 569, 575 (1st Cir. 1978). Determinations of disability involve "two independent areas of analysis -- nature (or duration) of

disability and degree of disability." *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259 (9th Cir.1990), *cert. denied*, 498 U.S. 1073 (1991). The parties agree that the Claimant's disability is permanent in nature, and I adopt their stipulation that he reached a point of maximum medical improvement on April 17, 2001 based on the uncontradicted medical opinion of his treating orthopedic surgeon, Dr. Zilberfarb. EX 3.[1] *See Morales v. General Dynamics Corp.*, 16 BRBS 293, 296 (1984), *aff'd in pertinent part sub nom Director, OWCP v. General Dynamics Corp.*, 769 F.2d 66 (2nd Cir. 1985).

1. Applicability of Collateral Estoppel

Initially, the Claimant argues that the issue of the extent of his disability is barred by the doctrine of collateral estoppel. In this regard, he states that Judge Jansen previously determined that he was temporarily totally disabled because he was unable to return to his regular, pre-injury work as a longshoreman and because P&W failed to establish that the availability of suitable alternative employment that he could perform. Contending that the evidence establishes that his condition did not improve after the September 2000 reconstructive surgery, the Claimant argues that the Respondents should be barred from relitigating the issue of whether or not his disability is total. Claimant's Brief at 7-8.

Collateral estoppel can be invoked under the Act to preclude a party from relitigating an issue decided in prior litigation. *Bath Iron Works Corp. v. Director, OWCP*, 125 F.3d 18, 21-23 (1st Cir. 1995). The doctrine is applicable if: (1) the issues at stake are identical in both cases; (2) the issue was actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in the earlier action. *Plourde v. Bath Iron Works Corp*., 34 BRBS 45, 46 (2000); citing *Figueroa v. Campbell Industries*, 45 F.3d 311, 315 (9th Cir. 1995). Here, however, the issues that were at stake before Judge Jansen are not identical to the issues raised in the present claim. The claim in that case was for *temporary* total disability resulting from the November 17, 1997 injury *before* the Claimant underwent reconstructive surgery in September 2000. The issue now being presented in whether the disability suffered by the Claimant *subsequent* to the September 2000 reconstructive surgery has become *permanent* and total. These issues are clearly different which renders collateral estoppel inapplicable. *See* 3 A. Larson, The Law of Workmen's Compensation, § 79.72(f) (1989) ("It is almost too obvious for comment that res judicata does not apply if the issue is claimant's physical condition or degree of disability at two entirely different times, particularly in the case of occupational diseases.").[2]

2. Extent of Permanent Disability

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[1] P&W's examining expert, Dr. Wyman concurred that the Claimant had reached a point of maximum medical improvement by April 2001. RX 4.

[2] Collateral estoppel and *res judicata* are related legal principles. As discussed above, collateral estoppel precludes relitigation of issues if certain conditions are satisfied and is thus sometimes referred to as "issue preclusion" while *res judicata* or "claim preclusion" bars relitigation of a previously adjudicated claim. *See Chavez v. Todd Shipyards Corp*., 28 BRBS 185, 189 (1994). *Res judicata* is also inapplicable since the present claim for permanent total disability benefits is not the same as the claim for temporary total disability litigated before Judge Jansen.

A three-part test is employed to determine whether a claimant is entitled to an award of total disability compensation: (1) a claimant must first establish a *prima facie* case of total disability by showing that he cannot perform his former job because of job-related injury; (2) upon this *prima facie* showing, the burden then shifts to the employer to establish that suitable alternative employment is readily available in the employee's community for individuals with the same age, experience and education as the employee which requires proof that "there exists a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job"; and (3) the claimant can rebut the employer's showing of suitable alternative employment with evidence establishing a diligent, yet unsuccessful, attempt to obtain that type of employment. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991) (*Legrow*), quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir.1981).

With regard to the Claimant's initial burden of proving that he cannot return to his usual employment, there is no dispute that the Claimant is unable, as Dr. Zilberfarb reported, to resume his pre-injury employment as a longshoreman because of his permanent restrictions on the use of his right arm. Indeed, Dr. Wyman testified that the Claimant could no longer work as a longshoreman. RX 8 at 20. Based on this evidence, I find that the Claimant is unable to return to his usual employment as a longshoreman.

Since the Claimant has established that he is unable to return to his usual employment, the burden shifts to P&W to demonstrate the availability of suitable alternative employment or realistic job opportunities which the Claimant is capable of performing and which he could secure if he diligently tried. To satisfy this burden, P&W must show the "precise nature, terms, and availability of the job[s]." *Plourde v. BIW*, 34 BRBS 45, 48 (2000), quoting *Legrow*, 935 F.2d at 434.[3] P&W has introduced an employability evaluation and testimony from Nancy L.

[3] It is noted that the First Circuit has rejected "a mechanical rule . . . that the employer must always demonstrate the availability of an actual job opportunity whenever a claimant shows an inability to perform his previous work", stating that "it is reasonable to require the employer to make such a strong showing when a claimant's inability to perform any available work seems probable, in light of claimant's physical condition and other circumstances such as claimant's age, education, and work experience . . . [but not] [w]here claimant's medical impairment affects only a specialized skill that is necessary in his former employment . . . ." *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 779 (1st Cir. 1979). I find that P&W must satisfy the higher evidentiary burden described in *Legrow* since the Claimant's limited, eighth grade education and work experience limited to heavy physical labor for which he is clearly no longer qualified, make it reasonable to presume that his restrictions on the use of his dominant upper extremity would prevent him from pursuing much if not all of the work for which he would otherwise be qualified. *See Dixon v. John J. McMullen and Assoc.*, 19 BRBS 243, 245-46 (1986).

Segreve, MA, CRC, a certified rehabilitation counselor with over ten years of experience in vocational rehabilitation counseling in the Boston area. RX 5. In her employability evaluation, Ms. Segreve reviewed the Claimant's work history and medical records including the restrictions outlined by Dr. Zilberfarb which she found compatible with jobs in the light and sedentary categories as defined by the U.S. Department of Labor. RX 5 at 2. Based on this information, Ms. Segreve identified approximately 50 jobs, as dispatcher, cashier, security guard and receptionist, from a labor market survey of available positions in the Claimant's geographic area which she determined to be suitable for the Claimant given his education, work experience and physical restrictions. *Id.* at 5-19. She also stated that these jobs have been available in significant numbers since April 2001. *Id.* at 19-20.

Ms. Segreve testified at the hearing that she had attempted to interview the Claimant in order to gather additional information about his educational and occupational histories, but the Claimant's attorney declined her request for an interview. TR 267-268. She acknowledged that the lack of an interview produced an incomplete vocational profile of the Claimant. TR 262-263. Specifically, she stated that she did not know the Claimant's educational level at the time that she prepared her report, and she was unaware of the facts that the Claimant does not drive and had a prior injury to the index finger on his left hand. TR 261-262. She said that these gaps in her understanding were filled in by the Claimant's testimony at the hearing. TR 268. Ms. Segreve testified that the Claimant's lack of a driver's license would eliminate some of the jobs listed as suitable in her report, and she conceded that the Claimant's testimony that he is unfamiliar with computers and has difficulty with writing would impede his ability to perform jobs such as emergency dispatcher which she described as fast-paced and hand-intensive. However, she stated that she did not include emergency dispatcher positions in her survey and that the dispatcher jobs that she did cite, such as jobs with alarm or tow truck companies, do not involve multiple calls or extensive, repetitive typing, and only require the incumbent to enter simple data (the time of the call, the address and phone number) into a computer, and she added that these positions allow the incumbent to use a telephone headset which eliminates use of the hands to pick up the telephone. TR 200-202, 232-233. She was also asked to address the issue of the Claimant not being able to control the frequency or sequence of calls which was raised by the Claimant's vocational expert as compromising the suitability of dispatcher jobs, and she testified that that Claimant would be able to wear a telephone headset, respond to calls by pushing a button with his left hand, and that he would not have to use his right hand repetitively or extensively. TR 202. Ms. Segreve further testified that there were security and customer service jobs in her report that require minimal use of the upper extremities, little or no data entry and primarily involve either monitoring surveillance cameras and/or interacting with the public with no requirement of physical response to emergency situations. TR 205-211. She stated that based on the Claimant's testimony that he has virtually no use of his dominant upper extremity, she would eliminate some of the cashier jobs listed in her report as suitable, but she would still consider the jobs as a security monitor and information or customer service clerk to be appropriate for the Claimant. TR 212. She also testified that she had not placed "heavy weight" on the Claimant's subjective complaints of pain in assessing his ability to perform alternate jobs because his medical records did not mention pain as a work-limiting factor. TR 215-216, 274.

She further stated that based on the Claimant's testimony regarding his level of pain, she would encourage him to pursue accommodations with prospective employers, but she said that his testimony did not alter her opinion that he is employable. TR 275-276.

On cross-examination, Ms. Segreve conceded that the Claimant's testimony changed her opinion on the suitability of certain jobs but not his overall employability, and she admitted that she had never actually placed a worker with precisely the same vocational profiles as the Claimant, namely, a 65-year-old with an eighth grade education, work history of 35 years as a longshoreman, a major injury affecting the dominant upper extremity and a minor injury affecting the non-dominant upper extremity. TR 239, 281, 286-287. She testified that she had assumed in preparing her report that the Claimant was not a high school graduate and did not have a GED, and she explained that she had listed jobs requiring a high school diploma because it has been her experience that employers often waive the diploma requirement in the case of a worker with a long history of steady employment. TR 261, 270-271.

In summary, Ms. Segreve testified that after consideration of all the available information concerning the Claimant, she believed the following positions to be suitable for him given his age, education, work experience and physical limitations: all dispatch, security monitor and information clerk positions; senior security assistant as the Boston University Athletic Center with minimal reaching/handling demands; dietetic assistant and information services representative at the South Shore Hospital in Weymouth; visitor assistant at the New England Aquarium in Boston; and rental clerk at Storage Depot in Quincy. TR 288-293; RX 5 at 4-19.[4]

In response to Ms. Segreve's opinions, the Claimant introduced a vocational report and testimony from Emmanuel B. Green, Ph.D, CRE, a vocational psychologist and certified vocational expert for the Social Security Administration and the U.S. Railroad Retirement Board. CX 5. Dr. Green interviewed the Claimant on October 8, 2001, reviewed the medical reports including the permanent restrictions identified by Dr. Zilberfarb, and administered a manual dexterity test. Based on this information, he concluded that the Claimant is precluded from performing, on a sustained basis, any competitive employment. EX 4 at 9. Dr. Green stated that his conclusion that the Claimant is unemployable was based on the Claimant's description of his ongoing pain and discomfort which were substantiated by the Claimant's posture during the interview and difficulty on the manual dexterity test. *Id.*

At the hearing, Dr. Green testified that, in contrast to Ms. Segreve, he took the Claimant's subjective pain levels into consideration in determining that he is permanently disabled from all competitive employment. TR 72. He further testified that he disagreed with Ms. Segreve's employability evaluation, stating that the jobs listed by Ms. Segreve are not consistent with the Claimant's limitations caused by his pain. TR 72-73. He explained that any job involves the use of a worker's hands, that the Claimant's pain is so severe that he is unable to even sign his name, and that the Claimant's increased pain from trying to use his hands on a job would interfere with his ability to perform other aspects of the job. TR 73-74. Dr. Green reviewed the jobs identified by Ms. Segreve as suitable for the Claimant, and he testified that it is his opinion that all of the

[4] Ms. Segreve testified that some of the jobs cited in her survey might not be readily accessible by public transportation, but others are. TR 269.

jobs are inappropriate because they all involve some use of the hands which would cause an increase of the Claimant's pain and thereby compromise his ability to work. TR 74-75.

It is abundantly clear from the divergent opinions offered by the two vocational experts that the question of whether P&W has met its burden of demonstrating the availability of suitable alternative employment turns on the credibility of the Claimant's complaints that he continues to suffer from such pain that he has virtually no use of his dominant upper extremity. If his pain and discomfort are as severe as he claims, Dr. Green's comprehensive analysis would support a finding of total disability. On the other hand, if the Claimant's pain would not prevent him from using his right upper extremity to the limited extent allowed by Dr. Zilberfarb, Ms. Segreve has identified several available jobs, with sufficient particularity regarding their nature, terms and availability, that the Claimant could realistically expect to secure and successfully perform. After carefully reviewing the entire record, I conclude that a preponderance of the evidence establishes that the Claimant does not suffer pain that would prevent him from performing any work.

Dr. Zilberfarb's records reflect that he was fully aware of the Complainant's reports of pain over the course of his post-operative examinations, yet he nonetheless made the assessment that the Claimant had derived significant benefit from the surgery and is capable of performing work that does not require lifting more than two pounds or repetitive use of the right elbow, wrist and hand. CX 2 at 2. Additionally, Dr. Wyman, a board-certified orthopedic surgeon who examined the Claimant in April 2001, testified that there were several inconsistencies between the Claimant's pain complaints and the findings that he and Dr. Zilberfarb made on examination. He testified that he was unable to examine the Claimant's elbow because the Claimant complained of exquisite tenderness while Dr. Zilberfarb reported ten days later that he had done a full palpation of the elbow. RX 8 at 12-13. He further testified that he found no evidence of atrophy in the right upper extremity which he would have expected given the degree of pain reported. *Id.* at 13-14. He stated that Dr. Zilberfarb's finding of no intrinsic muscle weakness is not consistent with what he would have expected based on the Claimant's subjective complaints. *Id.* at 14. Dr. Wyman explained how an injury to the ulnar nerve is manifest in a patient's hand and fingers, and he testified that the Claimant's reports of difficulty cutting food, writing a simple sentence, handling change and playing cards were not consistent with his findings on examination, and they are not the type of limitations one would expect with an injury to the ulnar nerve. *Id.* at 15-18. Finally, he testified that he found no evidence of joint stiffness, muscle weakness or sympathetic signs of skin changes, sweating or blueness in the hand as he would have expected based on the Claimant's alleged near total inability to use his right arm. TR 18-19. Under cross-examination, he agreed that there was nothing in his report (RX 4) that stated that the Claimant did not make a full effort during the examination, and he said that he had no reason to disbelieve what the Claimant told him during the examination. *Id.* at 24-25. Dr. Wyman described the surgery that the Claimant underwent in September 2000, and he testified that he had never seen a patient who had undergone that type of reconstruction experience the amount of pain described by the Claimant in the absence of a diagnosis of reflex sympathetic dystrophy, a condition for which he examined the Claimant and found no physical findings to support the diagnosis. *Id.* at 25-29, 30. Dr. Wyman also stated that it is not possible to show objectively that someone is not having pain, and he agreed that the Claimant's performance on the range of motion portion of his examination was not inconsistent with his claim that any use

of the arm causes him greater pain. *Id.* at 31, 38-39. However, he stated that the Claimant's reported inability to use his right hand to cut food or write his name is inconsistent with his and Dr. Zilberfarb's objective and subjective findings, though he agreed that the Claimant would have difficulty after writing steadily for 15 to 20 minutes. *Id.* at 39-43.[5]

Drs. Zilberfarb and Wyman examined the Claimant thoroughly and found no objective medical basis for concluding that he suffers from such severe and chronic pain that he is unable to use his right upper extremity for even light, non-repetitive work, and the record contains no diagnosis of a mental impairment which might account for the Claimant's alleged work-preclusive pain.[6] Moreover, Dr. Zilberfarb's records also indicate that the Claimant was released from his care in August 2001 with instructions to return as needed, and the absence of any evidence that the Claimant has returned to Dr. Zilberfarb or sought any further treatment is strongly suggestive that his pain is not as severe and debilitating as claimed. Although the Claimant presented at the hearing as a generally reliable and sincere witness,[7] I find that a preponderance of the evidence in the record establishes that his complaints of incapacitating pain with any use of the right upper extremity are not fully credible. Consequently, I have discounted Dr. Green's vocational opinions as they are heavily dependent on the Claimant's subjective reports of pain, and I credit Ms. Segreve's opinion that jobs have been available in the Claimant's community since April 2001 which are accessible by public transportation and which the Claimant could realistically obtain and successfully perform within his limitations. Since the Claimant has offered no rebuttal that he made a diligent, but unsuccessful, attempt to obtain the type of suitable alternative employment identified by Ms. Segreve, I conclude that P&W has met its burden of demonstrating the existence of suitable alternative employment and thereby established that the Claimant is not totally disabled.

In view of the Claimant's failure to establish that he is totally disabled by reason of the injury to his right arm, the compensation provided by the appropriate schedule provision for a permanent partial disability is, as P&W contends, his exclusive remedy under the Act. *PEPCO*, 449 U.S. at 274; *Rivera v. United Masonry*, 24 BRBS 78, 81 (1990). Section 8(c)(1) of the Act provides for compensation at 2/3 of the worker's average weekly wage for 312 weeks in the case of the loss of an arm. 33 U.S.C. § 908(c)(1). In a case such as this where the loss or loss of use is partial, compensation is based on the proportionate loss or loss of use of the member. 33 U.S.C. § 908(c)(19). That is, the percentage of the Claimant's loss of use of right arm must be applied to the number of weeks set forth in section 8(c)(1) to arrive at the proportionate number of weeks of compensation. *See Nash v. Strachan Shipping Co*., 15 BRBS 386, 391-92 (1983), *aff'd in relevant part but rev'd on other grounds*, 760 F.2d 569, (5th Cir. 1985), *aff'd on recon. en*

[5] Dr. Wyman explained that range of motion, or the extent to which a patient is able to move an extremity, is a subjective finding, and he stated that the Claimant demonstrated an ability to hold his right arm out during the range of motion examination which is inconsistent with his claim that he is unable to use this arm to do any work in front of him such as writing. RX 8 at 42-43.

[6] Dr. Green discussed the Claimant's reported pain extensively in his report but offered no diagnosis of a psychological condition.

[7] It is noted that Judge Jansen found the Claimant to be credible. CX 6 at 3.

banc, 782 F.2d 513 (1986). The only evidence in the record relating to the percentage of loss is found in the reports and testimony from Dr. Wyman who concluded that the Claimant's injury has produced a permanent partial loss of use which he assessed at ten percent under the criteria in the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition. RX 4 at 2; RX 8 at 20. While I have no doubt that Dr. Wyman, an expert in conducting disability evaluations, appropriately rated the Claimant's loss at ten percent under the AMA Guides, I am persuaded in the circumstances of this case that an award based upon a ten percent loss would grossly undercompensate the Claimant. There is no question on this record that the November 17, 1997 injury resulted in severe, permanent limitations which will prevent the Claimant from ever returning to his life-long occupation as a longshoreman and which will dramatically limit his ability to use his dominant upper extremity for the remainder of his life. In determining the extent of a worker's loss, "the Administrative Law Judge is not bound by any particular formula when determining the degree of permanent partial disability and that it is within his discretion to assess a degree of disability different from the ratings found by the physicians if that degree is reasonable." *Peterson v. Washington Metro. Area Transit Auth*., 13 BRBS 891, 897 (1981). In my view, the Claimant's permanent inability to use his right arm to lift more than two pounds, engage in any repetitive activities and, as Dr. Wyman testified, even write for more than 15 to 20 minutes, is closer to a total loss than it is to ten percent. Accordingly, I find that the Claimant's loss is 90%, and which is compensable under section 8(c)(1) of the Act at 2/3 of the stipulated average weekly wage ($1,163.47), multiplied by 280.8 weeks.

D. Compensation Due and Credits

In view of my finding that the Claimant suffered a work-related permanent partial disability involving his right arm, I conclude that he is entitled to an award of 280.8 weeks of compensation based on a 90 percent loss of at 2/3 of the stipulated average weekly wage of $1,163.47. 33 U.S.C. § 908(c)(1) and (19). This award shall commence as of April 17, 2001, the date of permanency. Since the parties have also stipulated that the Claimant has received temporary total disability compensation payments subsequent to April 17, 2001 pursuant to Judge Jansen's compensation order, I find that P&W is entitled to a credit in the amount of its prior compensation payments pursuant to section 14(j) of the Act. *Stevedoring Services of America v. Eggert*, 953 F.2d 552, 556 (9th Cir.1992), *cert. denied*, 505 U.S. 1230 (1992); *Balzer v. General Dynamics Corp*., 22 BRBS 447, 451 (1989), *aff'd on recon*., 23 BRBS 241 (1990).

III. Order

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

(1) The Employer and Carrier shall pay to the Claimant permanent partial disability compensation pursuant to 33 U.S.C. § 908(c)(1) and (19) at the weekly rate of $775.63 for a period of 280.8 weeks commencing April 17, 2001, subject to the Employer's credit pursuant to 33 U.S.C. § 914(j) in the amount of its payments of temporary permanent partial disability compensation for the period commencing April 17, 2001; and

(2) The Employer and Carrier shall be allowed 15 days from the date this decision and order is filed in the Office of the District Director to file any objection to the fee application filed by the Claimant's attorney in this matter.

SO ORDERED.

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DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachsetts